

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PacifiCorp, (U 901-E) for
Exemption from the Requirements of California
Public Utilities Code Section 851.

Application 02-10-031
(Filed October 23, 2002)

O P I N I O N**Summary**

This decision approves the transfer of water rights and assets associated with PacifiCorp's Naches hydroelectric facility (Naches) to the United States Bureau of Reclamation (Reclamation) pursuant to Pub. Util. Code § 851.¹ The Commission finds that the transfer is in the public interest and meets the California Environmental Quality Act (CEQA) § 21080(b)(14) exemption.

Background to the Application

PacifiCorp requests an exemption from § 851, which governs transfers of utility property. PacifiCorp proposes to sell the water rights and assets associated with Naches, which is located in the State of Washington, to Reclamation. Naches is a 7.8-megawatt (MW) capacity "run of river" facility. The facility only provides on a system basis an average of 3.5 MW, and California represents only 2% of the system load for a 70-kilowatt (kW) share. The Federal Energy Regulatory Commission (FERC) does not license the facility.

¹ All statutory references are to the Pub. Util. Code, unless otherwise noted.

We affirm the Assigned Commissioner's preliminary determination² that § 851 does apply. Section 851 states in part that no public utility "shall sell, lease, ...or otherwise dispose of or encumber the whole or any part of ... property necessary or useful in the performance of its duties to the public, ... without first having secured from the Commission an order authorizing it to do so." As an integral part of the Commission's decision-making process in reviewing a § 851 application the Commission may "take such action, as a condition to the transfer, as the public interest may require."³ The Commission made a preliminary finding in Resolution ALJ 176-3099, issued on November 7, 2002, that the category for this proceeding is ratesetting and determined that the matter did require hearings. We have considered our preliminary determinations and find that a hearing is not necessary.

Discussion

The purpose of this proceeding is to determine whether it is in the public interest to find the Naches facilities is no longer used and useful as defined in § 851. The application as filed was insufficient and the Scoping Memo directed PacifiCorp to supplement its application and testimony.

There was a prehearing conference scheduled on January 21, 2003, which was canceled after PacifiCorp served its supplemental testimony on January 13, 2003. No parties protested the application.

² Assigned Commissioner's Ruling Establishing Category and Providing Scoping Memo (Scoping Memo) in Compliance With Article 2.5, SB 960 Rules and Procedures, dated January 2, 2003.

³ D.3320, 10 CRRC 56, 63.

Regulatory Authority Exists to Allow This Transfer

Under our existing statutory authority, this transaction would not be permissible before January 1, 2006, except for a specific enabling statute in 2002, AB 1235. AB X1-6 was enacted on January 18, 2001 and it added § 377⁴ to read in relevant part: “(n)otwithstanding any other provision of law, no facility for the generation of electricity owned by a public utility may be disposed of prior to January 1, 2006. The commission shall ensure that public utility generation assets remain dedicated to service for the benefit of California ratepayers.”

SB 2X-39 was subsequently enacted on April 26, 2002. It amended § 362, adding § 362(a)⁵ and required the Commission to ensure in proceedings under § 851 that a sale would not adversely impact system reliability. The prepared testimony⁶ in this proceeding shows that the Naches facility is not critical to system reliability. This is an old plant, its output is small and it is run-of-the-river, which means that it can only generate power when there is sufficient water flow.

AB 1235 was enacted September 24, 2002, and it added § 377.1⁷ that specifically exempts the Naches hydroelectric facilities from the § 377 requirements. This statute did not exempt this project from CEQA and therefore, as discussed below, the Commission must be able to make the necessary findings under CEQA before approving this transfer.

⁴ Stats. 2001, Ch. 2.

⁵ Stats. 2002, Ch. 19.

⁶ Exhibit PPL/100 – see the description of the facility and its operations.

⁷ Stats. 2002, Ch. 840.

Washington State's Approval

The State of Washington's utility regulatory agency has primary jurisdiction over the Naches. In its supplemental testimony⁸ PacifiCorp provided a copy the Order Granting Application, dated October 9, 2002, that is the Washington Utilities and Transportation Commission's approval of the transaction.

In addition, PacifiCorp received authority for the transfer from the Oregon Public Utilities Commission on November 12, 2002.⁹ The Wyoming Public Service Commission gave verbal authority for the transfer on December 30, 2002. The transaction does not require formal approval under the rules of the Utah Public Service Commission. Idaho Public Service Commission approval is not required.¹⁰ In light of these assurances, especially the formal approval of the State of Washington where the plant is physically located, this Commission is able to issue a final decision without regulatory approvals pending elsewhere.

Compliance With CEQA

As an integral part of the Commission's decision-making process, the Scoping Memo Ruling directed PacifiCorp to submit sufficient evidence that would enable the Commission to comply with CEQA. We are guided by § 21080(b)(14) of the Public Resources Code, which exempts the Commission from acting as a Responsible Agency under CEQA if certain conditions are met. CEQA does not apply to any project or portion thereof located outside of

⁸ Supplemental Exhibit 501.

⁹ Supplemental Exhibit 502.

¹⁰ Supplemental Testimony Exhibit 500, pages 1-2.

California¹¹ that is subject to an environmental impact review pursuant to the National Environmental Policy Act of 1969 (NEPA) or pursuant to a law of that state requiring preparation of a document containing essentially the same points of analysis as in an Environmental Impact Statement prepared under NEPA.

Pursuant to NEPA, Reclamation prepared a programmatic environmental impact statement (PEIS) to implement the provisions of the legislation authorizing the Yakima River Basin Water Enhancement Project (Enhancement Project). The purpose of the Enhancement Project was to meet the competing needs of the Yakima River basin through improved water conservation and management, and other appropriate means.

PacifiCorp provided a copy of the *Finding of No Significant Impact and Final Environmental Assessment Wapatox Project*¹² dated December 31, 2002, that was prepared by the U.S. Bureau of Reclamation.¹³ The Finding of No Significant Impact (FONSI) concluded that the preferred alternative, to purchase the water rights and land of the Naches Project, would have no significant (negative) impacts.

The proposed action would provide needed benefits to instream resources, especially aquatic species listed under ESA [Endangered Species Act]. This would be a positive step in providing for Indian Trust Assets (ITAs). The action would not affect environmental

¹¹ § 15277, Title 14. California Code of Regulations - Chapter 3. Guidelines for Implementation of the California Environmental Quality Act Article 18. Statutory Exemptions.

¹² Supplemental Exhibit 601.

¹³ U.S. Bureau of Reclamation, Pacific Northwestern Region, Upper Columbia Area Office, Yakima, Washington.

justice or sacred sites. PacifiCorp will undertake hazardous materials remediation prior to the purchase. Documentation, as required under the National Historic Preservation Act (NHPA), would provide valuable historic information on the Wapatox power system.

Based on a thorough review of the comments received, analysis of the environmental impacts as presented in the final EA [Environmental Assessment], EAS Section 7, consultation, coordination with the YN [Yakima Nation] and implementation of all environmental commitments identified in the final EA, Reclamation has concluded that the implementation of the recommended action would have no significant impacts on the quality of human environment or the natural resources of the area. This finding of No Significant Impacts has therefore been prepared and submitted to document environmental review and evaluation in compliance with the National Policy Act of 1969. (Page 4, *mimeo.*)

In determining whether the NEPA requirement was met for the purpose of an exemption under § 21080(b)(14), we have reviewed the FONSI and find that it is adequate to demonstrate NEPA compliance. Accordingly, pursuant to § 21080(b)(14) CEQA does not apply to this application.

The Public Interest and Proposed Accounting Treatment

The underlying assertions¹⁴ behind the sale are (1) that the Yakima River Basin would benefit from the closure and transfer of Naches to Reclamation, and (2) that a lower cost option, purchasing energy at market prices, is preferable to the ongoing need for investment and the operating costs of the facilities. PacifiCorp also asserted (3) that the facility could have been subject to an expensive licensing proceeding at FERC. The testimony of PacifiCorp's

¹⁴ See the Prepared Testimony of Barry G. Cunningham, Vice President of Generation for PacifiCorp.

Managing Director of Hydro Resources¹⁵ showed that under most scenarios the cost of continued operations of Naches was not economic for ratepayers. If the company were compelled to litigate a FERC license, the costs would only increase. Only by reducing capital and operating expenses can PacifiCorp show one slightly profitable scenario. Given these forecasts it is reasonable to expect ratepayers to benefit at market prices for replacement energy compared to the continued operations of this small plant. Therefore, we find that it is in the public interest to authorize PacifiCorp to transfer the Naches facility to Reclamation.

PacifiCorp's proposed accounting treatment was not protested.¹⁶ A slight after-tax gain on the sale (\$74,000) is expected and California's share would be about \$1,000. PacifiCorp proposed that the gain be dealt with in its next general rate proceeding. The current proceeding, A.01-03-026 has already been submitted. This next case may not occur because PacifiCorp has a proposed sale of its California Operations (not yet pending before this Commission). We find the outcome de minimus, regardless of the outcome of the proposed sale, and we will adopt the accounting proposal.

Waiver of Comment Period

Pursuant to Rule 77.7(f)(9), the otherwise applicable 30-day period for public review and comment is being waived.

¹⁵ See Prepared Testimony and exhibits of Randy A. Landolt.

¹⁶ Exhibit PPL/302.

Assignment of Proceeding

Michael Peevey is the Assigned Commissioner and Douglas Long is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Naches hydroelectric facility is a small and old facility not needed for system reliability.
2. According to the environmental assessment prepared under NEPA, PacifiCorp's proposed sale of the Naches hydroelectric facilities would have positive environmental benefits.
3. There are more economical and reasonable market alternatives to the continued operation of Naches.
4. Reclamation issued a *Finding of No Significant Impact and Final Environmental Assessment Wapatox Project*¹⁷ dated December 31, 2002, in compliance with NEPA of 1969, as amended.
5. Naches is located in Washington State.
6. There are no disputed material facts and hearings are not needed.

Conclusions of Law

1. This transaction is within the discretionary authority of the Commission under § 851 and § 377.1.
2. This transaction is permissible under § 362(a).
3. The sale is in the public interest pursuant to § 851.
4. The FONSI prepared by the Bureau of Reclamation is adequate to demonstrate NEPA compliance.

¹⁷ Supplemental Exhibit 601.

5. Naches is an out-of-state project for purposes of Public Resources Code § 21080(b)(14).

6. Section 21080(b)(14), of the Public Resources Code provides that CEQA does not apply to an out-of-state project that is subject to NEPA review or similar state environmental review law of that state.

7. Pursuant to Public Resources Code § 21080(b)(14), CEQA does not apply to this application.

8. This order should be effective immediately, because it is the last required regulatory approval, in order to allow PacifiCorp to promptly conclude the transfer to Reclamation.

O R D E R

Therefore, **IT IS ORDERED** that:

1. PacifiCorp is authorized to transfer the Naches hydroelectric facility to the United States Bureau of Reclamation pursuant to Pub. Util. Code § 851.

2. PacifiCorp shall include the California jurisdictional share of the gain on sale in its next ratesetting proceeding.

3. We modify the preliminary determination made in Resolution ALJ 176-3099 and make a final determination that evidentiary hearings are not required in this proceeding.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.